TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 364

ALBERT SMITH, PETITIONER,

vs.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED AUGUST 22, 1940.

CERTIORARI GRANTED OCTOBER 21, 1940.

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[fol. 5]

IN DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF NEBRASKA IN AND FOR LANCASTER COUNTY

Habeas Corpus. No. V-248

ALBERT SMITH, Petitioner,

vs.

JOSEPH O'GRADY, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Respondent

PETITION FOR A WRIT OF HABEAS CORPUS—Filed February 14, 1940

To the Honorable Court:

Comes now Albert Smith, the petitioner herein, who respectfully invokes the jurisdiction of this Honorable Court under color of authority of Article I, Section 9, Paragraph 2 of the Constitution of the United States, Article I, Section 8 of the Constitution of the State of Nebraska, and Chapters 27-317 and 29-2801 and subsequent chapters of the Compiled Statutes of Nebraska for 1929, all of which give the District Courts of Nebraska jurisdiction to issue writs of habeas corpus; and your petitioner respectfully shows to this Honorable Court that he is actually and unlawfully restrained of his liberty within the jurisdiction of this Court, being detained in the Nebraska State penitentiary at Lancaster, Lancaster County, Nebraska in [fol. 6] the custody of Joseph O'Grady, Warden, under color of authority of a process of the State of Nebraska by virtue of an unlawful commitment based upon a void and illegal judgment and sentence rendered by the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County, said void and illegal judgment and sentence being rendered by the aforesaid trial court without jurisdiction of or over the defendant (the petitioner herein) or the subject-matter, and made under the following circumstances as hereinafter shown.

Statement of the Case

Your petitioner was arrested at Arapahoe, Furnas County, Nebraska, on or about September 19, 1932, and taken to Beaver City, Nebraska, where he was held in the Furnas County jail for about two hours. On the same date your petitioner was removed to the Buffalo County jail at Kearney, Nebraska, where he was held for two days without being informed of the cause of his arrest. On the third day after his arrest, on or about September 22, 1932, your petitioner was told he was wanted on a charge of burglary in Valley County, Nebraska, and that if he would agree to plead guilty to the charge (of burglary) he would be dealt with leniently. To this your petitioner agreed, on the condition that such an arrangement was first sanctioned by the County Attorney of Valley County. Accordingly, the Valley County Sheriff, Mr. George S. Round, arranged for your petitioner to talk by long distance telephone, from the office of the Buffalo County jail, with the County Attorney of Valley County, Nebraska, Mr. George A. Munn. In the presence of Valley County Sheriff Round and Mr. Otto Dudschus, then a Depity Sheriff of the State of Nebraska, your petitioner conversed, by long distance telephone, with a person identified by Sheriff Round as the County Attorney of Valley County, Mr. George A. Munn. At this time Mr. Munn agreed to a bargain in which it was understood that if your petitioner would plead guilty, the sentence [fol. 7] meted out to him by the Court would not exceed three (3) years imprisonment in the Nebraska State Penitentiary. Following this telephone conversation and agreement, your petitioner was transferred to the Hall County jail at Grand Island, Nebraska, by the aforesaid Mr. Otto Dudschus, where he was confined for about three more days. On the following Monday morning, on or about September 24, 1932, your petitioner was taken to the Valley County jail at Ord, Nebraska, and there confined pending trial. During the following two or three days your petitioner had many conversations with Sheriff Round, and on two different occasions he requested the Sheriff to get him a copy of the charge filed against him. In response, Sheriff Round told your petitioner that the charge had not yet been filed, but that it was not necessary for him to have a copy anyway, for everything had been "fixed." Finally, on or about September 27, 1932, at or about 1:30 in the afternoon, without ever having had a copy of the charge filed against

him served upon him, your petitioner was taken before the District Court of the Eleventh Judicial District of Nebraska in and for Valley County, whereupon he was summarily arraigned, and, upon his prearranged plea of guilty, sentenced, to his surprise and consternation, to a term of twenty (20) years imprisonment in the Nebraska State Penitentiary. Your petitioner had never before been in a court room for any purpose whatsoever, and his knowledge of law and legal procedure was therefore extremely limited. Notwithstanding this fact, your petitioner protested vigorously and asked both the Court and the County Attorney to show him a copy of the charge to which he had entered a plea of guilty. This request was refused. Your petitioner then requested permission of the Court to withdraw his plea of guilty and, at the same time, he requested that an attorney be appointed to assist and advise him, and that he be given a proper opportunity to defend himself. These requests were also refused by the Court and, within the hour, your petitioner was on his way to the penitentiary [fol. 8] in the custody of the sheriff of Valley County, Nebraska. Not until after your petitioner had been committed to the penitentiary did he discover that he had been duped and inveigled into entering a plea of guilty to a charge of burglary with explosives, and not until seven (7) years later, on October, 1939, did your petitioner actually see a copy of the charge, and then only after he had purchased it for the sum of one dollar and fifty cents ($1.50).

In the intervening years your petitioner has made every effort an uneducated layman could possibly make to have this unjust and illegal imprisonment terminated. Being without the necessary funds to hire counsel, and knowing nothing of appellate procedure, your petitioner was unable, because of these shortcomings, to carry an appeal to the Supreme Court of Nebraska. His appeals to the Board of Pardons of the State of Nebraska have likewise been futile. Finally, in desperation, your petitioner purchased a certified copy of the Information, Judgment, and Sentence, as the same appears of record in the office of the Clerk of the Valley County District Court and, upon the foundation laid by these records of the trial court, ("Exhibit A"), this petition was prepared, with the assistance of another inmate of the Nebraska State Penitentiary, all of which is permissible and in accordance with the habeas corpus statutes of the State of Nebraska.

A certified copy of the aforesaid information, Judgment, and Sentence, as the same appears of record in the office of the aforesaid Clerk of the Valley County District Court, is hereto attached (at pages 7 to 12 inclusive) and marked "Exhibit A" and made a part of this petition, and the same to be considered as if set out in full herewith

* * *

REASONS RELIED UPON FOR ISSUANCE OF WRIT

Your petitioner, Albert Smith, contends and alleges that he was deprived of a fair and impartial trial; that the judgment, as hereinbefore set out, "Exhibit A", is void [fol. 9] and a legal nullity; and that the commitment by which he is detained and restrained of his liberty by the respondent is therefore a legal nullity, in this, to-wit:

I

Your petitioner contends and alleges that he was deprived of his constitutional right to know the nature and cause of the accusation for which he was to answer, and that he was deprived of a copy thereof in writing, all of which is provided by Chapter 29-1802 of the Compiled Statutes of Nebraska for 1929, and by Article I Section 11 of the Constitution of the State of Nebraska, and by the Sixth Amendment to the Constitution of the United States.

II

Your petitioner contends and alleges that he was deprived of his constitutional right to have the assistance of competent legal counsel to aid and advise him, all of which is provided by Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929, and by Article I Section 11 of the Constitution of the State of Nebraska, and by the Sixth Amendment to the Constitution of the United States.

III

Your petitioner further contends and alleges that he did not waive the fundamental constitutional rights of which he was deprived as shown in the first and second preceding allegations of this petition, namely, (1) to know the nature and cause of the accusation for which he was

to answer, or to receive a copy thereof in writing; and (2) to the assistance of competent legal counsel.

IV

Your petitioner further contends and alleges that the judgment as pronounced by the trial court, and as shown by your petitioner's "Exhibit A", is void and a legal nullity and was rendered contrary to and in violation of Chapters 29-2201 and 29-2202 of the Compiled Statutes of Nebraska for 1929, in that it does not show a conviction by a jury or a finding of guilt by the trial court.

[fol. 10]

V

Your petitioner further contends and alleges that, because of the above and foregoing, he was arbitrarily deprived of his constitutional right to due process of law as provided by Article I Section 3 of the Constitution of the State of Nebraska and the Fourteenth Amendment to the Constitution of the United States, in that the trial court did not have jurisdiction to arraign, or to accept a plea from, your petitioner, without first supplying him or seeing to it that he was supplied, with a copy in writing of the nature and cause of the accusation for which he was to answer; or without notifying him in open court, in language sufficiently common to be understood by the petitioner, of the nature and cause of the accusation for which he was to answer; nor did the trial court have jurisdiction to proceed to trial against your petitioner, after petitioner had requested the assistance of an attorney, without first appointing competent legal counsel to aid and advise him in his defence.

VI

Your petitioner further contends and alleges that the judgment and sentence as rendered against him by the aforesaid District Court of Nebraska in and for Valley County, as set out in the aforesaid "Exhibit A", are void and legal nullities and without force or effect upon your petitioner, in that the aforesaid trial court of Valley County did not have jurisdiction of or over the person of the defendant (the petitioner herein) or of the subject-matter at any stage of the proceedings.

VII

Therefore, your petitioner contends and alleges that the commitment by which he is detained and restrained of his liberty by the respondent is also void and a legal nullity, in that it was made under color of authority of an unlawful and illegal judgment and sentence rendered by the aforesaid trial court of Valley County in and [fol. 11] for the State of Nebraska, and under these circumstances habeas corpus is proper and will lie to release your petitioner from such unlawful and illegal restraint and imprisonment.

Wherefore, your petitioner, Albert Smith, having shown that he is being restrained and deprived of his liberty by the respondent in violation of the laws and Constitution of the State of Nebraska and the Constitution of the United States, respectfully prays that Joseph O'Grady, as warden of the Nebraska State Penitentiary, be made the respondent in this cause of action; that the ancient and honorable writ of habeas corpus issue to Respondent Joseph O'Grady, commanding him to present the petitioner, Albert Smith, instanter, before this Honorable District Court of the Third Judicial District of Nebraska in and for Lancaster County to answer by what right or authority he has, if any, to restrain and deprive your petitioner of his liberty; that all the matters complained of herein be examined by this Honorable Court; that the judgment, sentence, and commitment herein complained of be declared null and void, and that the petitioner, Albert Smith, be released therefrom without delay, as law and justice require.

And your petitioner will ever pray.

Albert Smith, Petitioner pro se., #11283, Nebraska State Penitentiary, Lincoln, Nebraska.

EXHIBIT "A" TO PETITION

Clerk's Certificate to information and judgment omitted in printing.

[fol. 12] Copy

IN THE DISTRICT COURT OF VALLEY COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,

vs.

ALBERT SMITH, Defendant

JOURNAL ENTRY OF JUDGMENT

Now on this 27th day of September, 1932, the above entitled action came on for hearing upon the Information filed herein by the County Attorney in and for the County of Valley, State of Nebraska.

The Plaintiff, The State of Nebraska, being represented in open Court by George A. Munn, County Attorney, and the Defendant, Albert Smith, being present in person in Open Court. Trial had.

Defendant appearing in Court and waives preliminary examination and asks that he be arraigned at once.

Thereupon the Defendant was duly and legally arraigned and plead "Guilty" to the Information as charged.

It Is Therefore Considered and Adjudged that the Defendant, Albert Smith, be taken to the Nebraska Penitentiary at Lancaster, Nebraska, and there confined at hard labor, Sundays and Holidays excepted, for a period of Twenty Years and that he pay the costs of this action. Solitary Confinement forms no part of this Sentence.

By the Court, (S.) Edwin P. Clements, Judge of the District Court.

Doc. 13, Page 109, No. 3509.

INFORMATION

DISTRICT COURT

[fol. 13] VALLEY COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,

vs.

ALBERT SMITH, Defendant

Information for Burglary With Explosives

Section 28-543

Filed September 27th, 1932

(S.) Alfred A. Wiegardt, Clerk of the District Court. By —— ——, Deputy. George A. Munn, County Attorney.

Witnesses: Otto Dudschus, Z. D. Fitch, Ray Carroll, William Flake, Frank Rennacker, Frank Pierce, Glenn Fox, Henry Frey, George S. Round, Roy F. Pardue, Leonard H. Covert, Ray Martin, Elvira Beeh.

Bail fixed in the sum of $——

——— ———, Judge.

Arraigned September 27th, 1932, and entered plea of Guilty.

(S.) Alfred A. Wiegardt, Clerk of the District Court.

Information—County Attorney

STATE OF NEBRASKA,
County of Valley, ss:

Copy

In the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County.

[fol. 14] INFORMATION—Burglary with Explosives—Section 28-543

THE STATE OF NEBRASKA, Plaintiff

vs.

ALBERT SMITH, Defendant

Be It Remembered, That George A. Munn, County Attorney in and for Valley County, and in the Eleventh Judicial District of the State of Nebraska, who prosecutes in

the name and by authority of the State of Nebraska, comes here in person, into Court at this, the September 27 term, A. D. 1932, thereof, and for the State of Nebraska gives the Court to understand and be informed that Albert Smith late of the county aforesaid, did on the Fifteenth day of September, A. D. 1932, in the County of Valley and State of Nebraska aforesaid, then and there being, did then and there wilfully, unlawfully, feloniously, burglariously, maliciously and forcibly break and enter into the Chicago, Burlington & Quincy Railroad Company, a corporation, station house depot building in the City of Ord, Valley County, Nebraska, and did then and there wilfully, unlawfully, feloniously and maliciously by the use of explosive commonly called nitroglycerine or soup forcibly explode and break open a safe there situated with the intent and accomplished purpose then and there wilfully, unlawfully, feloniously, burglariously and maliciously to injure said safe, the property of the Railway Express Agency, Inc., a corporation, and to steal take and carry away from said building and safe the goods and chattels of the said Chicago, Burlington & Quincy Railroad Company, a corporation, and Railway Express Agency, Inc., a corporation, without the consent and against the will of the said Chicago, Burlington & Quincy Railroad Company, a corporation, and Railway Express Agency, Inc., a corporation, the respective owners thereof—Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska.

[fol. 15] (S.) George A. Munn, County Attorney.

State of Nebraska,
County of Valley; ss.:

I,—Sheriff in and for Valley County, Nebraska, do hereby certify that on the — day of ——, A. D. 19— in the county aforesaid, I served a true and certified copy of the within information on the herein Defendant —— by delivering to him personally a true and certified copy of said information with all endorsements thereon.

Dated at Ord, Nebraska, in said county, this — day of — A. D., 19—. —— —— Sheriff.

STATE OF NEBRASKA,
County of Valley, ss.:

George A. Munn, being first duly sworn, upon his oath says that he is the County Attorney in and for Valley County, in the Eleventh Judicial District of the State of Nebraska, and that the allegations and charges against the defendant Albert Smith in the within information are true as he verily believes.

George A. Munn, County Attorney.

Subscribed in my presence and sworn to before me this Twenty-seventh day of September, A. D. 1932.
Alfred A. Wiegardt, Clerk of the District Court.
(S.) Alfred A. Wiegardt. (Seal.)

STATE OF NEBRASKA,
County of Lancaster, ss.:

I, L. M. Larsen, a duly appointed and authorized Notary Public in and for Lancaster County, Nebraska, do hereby [fols. 16-58] certify that I have read and examined the above and foregoing pages, numbered seven (7) to twelve (12) inclusive and marked as "Exhibit A", and do find the same to be a true and correct copy of a certified copy of the Information, Judgment, and Sentence in the case as represented therein insofar as the contents, dates, certifications, and signatures appearing on this copy, marked as "Exhibit A" on the aforesaid pages seven (7) to twelve (12) inclusive, are concerned.

In Witness Whereof, I have hereunto set my hand and affixed my seal this 13 day of December, A. D. 1939.

L. M. Larsen, Notary Public in and for Lancaster County, Nebr. My commission expires November 19th, 1943. (Seal.)

Brief Argument in support of Petition for a Writ of Habeas Corpus omitted in printing.

[fol. 59] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION FOR LEASE TO PROCEED IN FORMA PAUPERIS—Filed February 14, 1940

Comes now the movant, Albert Smith, who is the petitioner in the above entitled cause of action, and respectfully moves that this Honorable Court grant him leave to file and proceed to a conclusion with said petition for a writ of habeas corpus as an impecunious person.

The movant states that, because of his poverty he is unable to pay the Clerk's cost of filing fees in the foregoing cause of action in this Honorable Court and moves that such costs be allowed by this Court because of petitioner's poverty.

The movant further states that, because of his poverty [fol. 60] he is unable to secure the aid or assistance of competent legal counsel, and moves this Honorable Court to appoint an attorney to aid and assist the petitioner in his cause of action in order that he may better prosecute his petition and defend his constitutional rights; and the movant herein further moves this Honorable Court to allow counsel fees so incurred to be taxed as costs and audited as per the provisions of Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929.

The movant herein has invoked his constitutional and statutory right to the assistance of counsel, as shown in the first preceding paragraph, on the grounds that habeas corpus is habeas corpus, no matter under what circumstances or under what conditions it may be invoked. The Legislature of the State of Nebraska saw fit to include the right to demand the assistance of legal counsel when Chapter 29-716 of the Compiled Statutes of Nebraska, Supplement for 1937, was being prepared for passage, for it is stated therein, that:

"29-716. Arrest, Opportunity to Be Given Prisoner to Apply for Writ of Habeas Corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime which which he is charged And That He Has the Right to Demand Legal Counsel: * * *"

True enough, the circumstances related to the above quoted statute concern only the subject of extradition, but if it is lawful in the State of Nebraska to appoint counsel to assist the petitioner in a habeas corpus action under one circumstance, it is also lawful in the State of Nebraska to appoint counsel to assist the petitioner in a habeas corpus action under any other circumstances. The Legislature of the State of Nebraska, when preparing Chapter 29-716, supra, fully realized the inability of an ordinary layman to protect his rights, for even the intelligent and educated layman has small and sometimes no skill in the science of law, and therefore provided for the petitioner to have the right to [fol. 61] demand the assistance of legal counsel in a habeas corpus action.

The movant herein, the petitioner in this habeas corpus action, is an uneducated layman who lacks both the skill and knowledge to adequately present his case in open court. As was so properly said by the United States Supreme Court in the recent case of Palko v. Connecticut, 302 U. S. 319, 325, if the petitioner, the movant herein, is not granted, as an impecunious person, the aid and assistance of competent legal counsel, justice will not "still be done."

Wherefore, the movant herein, Albert Smith, respectfully moves this Honorable Court to allow this motion in its entirety, to the end that law and justice may prevail.

Respectfully submitted, Albert Smith, Movant and Petitioner, #11283, Nebraska State Penitentiary, Lincoln, Nebraska.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

AFFIDAVIT OF SINCERITY AND POVERTY—Filed February 14, 1940

STATE OF NEBRASKA,
County of Lancaster, ss:

Albert Smith, of lawful age, being first duly sworn upon his oath, deposes and sayeth: That, he is the petitioner in the above entitled cause of action, and that the facts as stated in the attached petition for a writ of habeas corpus,

exhibit, brief argument, and motion are true according to his best knowledge and belief, and that such petition and [fol. 62] supporting documents are filed with all sincerity and truth.

The affiant further deposes and sayeth: That, he is an impecunious person, having no income and possessing no real nor personal property; that, he is a citizen of the United States of America by birth and verily believes he has a meritorious cause of action and is entitled to the redress prayed for in the petition.

Albert Smith, Affiant.

The above Affidavit of Sincerity and Poverty subscribed in my presence and sworn to before me, a duly appointed and authorized Notary Public in and for Lancaster County, Nebraska, this 13th day of December, A. D. 1939.

L. M. Larsen, Notary Public in and for Lancaster County, Nebr. My commission expires November 19th, 1943. (Seal.)

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER DISMISSING PETITION—February 28, 1940

Writ of habeas corpus prayed for herein is denied because the petition filed herein does not state a cause of action therefor. It is therefore considered, ordered and adjudged by the Court that this petition for writ of habeas corpus be and hereby is dismissed at costs of plaintiff, taxed at $, [fol. 63] for which execution is hereby awarded.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION FOR RECONSIDERATION ON PETITION FOR WRIT OF HABEAS CORPUS—Filed March 4, 1940

To the Honorable E. B. Chappell, Judge:

Comes now your petitioner, Albert Smith, the movant herein, and respectfully moves this Honorable Court to

reconsider the Order entered by this court, on February 28, 1940, in the above entitled cause of action, and for cause states:

That your petitioner invoked the original jurisdiction of this Court in his petition in a sincere effort, free from collusion or levity, to show this Court that he was, and is now being, restrained and deprived of his liberty contrary to and in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and Article I Section 3 of the Constitution of the State of Nebraska. Your petitioner showed, to the best of his ability and without the advice or assistance of legal counsel, just how and in what manner his constitutional rights had been violated, and if your petitioner has "not stated a cause of action which permits this court to grant a writ of habeas corpus", it is not because a cause of action is lacking, but rather because petitioner lacks sufficient legal knowledge and language necessary to properly state his cause of action, and because he is without legal counsel to advise and assist in the prosecution of his action.

It is said that the Constitution of the United States is [fol. 64] the Supreme Law of the Land, for it is so written therein. Believing this to be true, and depending upon this Sacred Document as a bulwark of protection from the injustice he is now suffering, your petitioner has taken the liberty to prepare this Motion for Reconsideration.

Following the denial of your petitioner's application for a writ of habeas corpus, this Court wrote the following communication to your petitioner, to-wit:

Febr. 28, 1940.

Mr. Albert Smith, Box 11-283, Lancaster via Lincoln, Nebr.

My dear sir:

The honorable John L. Polk, presiding judge for this district, has assigned to me for disposition your petition for writ of habeas corpus filed in this court. I am sorry to inform you that you have not stated a cause of action which permits this court to grant a writ of habeas corpus, and your application, therefore, has been denied and your petition dismissed at your costs.

Your own petition shows that more than seven years ago in a district court of this state you waived preliminary

hearing, were arraigned upon the information, and pleaded guilty thereto in open court. Under such circumstances the law is that you waived any right to have the information served upon you as contended for in your petition.

The statute, Section 29-2801, provides: "If the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus."

If the statements made in your petition are true, you probably suffered an injustice, but the remedy cannot be by habeas corpus. To obtain release by habeas corpus, the judgment must be absolutely void. Your best remedy, under the circumstances, is before the Parole and Pardon [fol. 65] Board of the State of Nebraska which is composed of men who are always willing to give attention to such matters if they appear to have merit in them.

Respectfully yours, E. B. Chappell.

To this communication your petition can only say that, if this be the true opinion of this Court, then this Court has quite evidently missed the pertinent points of petitioner's argument, and exception is herewith taken to the entire second paragraph and to the last eight words of the first sentence in the fourth paragraph.

This Court states that the petitioner was "arraigned upon the information, and pleaded guilty thereto in open court". This is not true nor was it so stated in the petition. Upon page 20 of the original petition, your petitioner showed how and in what manner he was inveigled, by the suave, underhanded methods of a corrupt official of the trial court to enter a plea of guilty to what your petitioner had been given to understand to be a charge of common burglary. Never has your petitioner ever knowingly entered a plea of guilty to any other charge. Upon discovering this "frame-up", your petitioner objected strenuously, but to no avail. Thus, the court itself became a party to the frame-up. This fact was brought out to the best of your petitioner's ability, yet this Court said that "Under such circumstances the law is that you waived any right to have the information served upon you as contended for in your petition." Does this Court mean to say that the law condones a frame-up? Without knowledge of the true charge which had been filed against him, and without knowledge of

the true intent of the proceedings taking place in court, how can this Court honestly say that your petitioner waived any of the rights of which he was deprived? This Court says that "Under such circumstances the law is * * *" [fol. 66] Just what law does this Court speak of? Surely not the statute, for there is no such statute in the State of Nebraska which condones a framed up, forcible waiver of this nature. True enough, the Supreme Court of Nebraska did so hold in the case of McCarty v. Hopkins, 61 Neb. 550, 85 N. W. 540, and other cases, but can such an opinion as this be held as ruling law when the Supreme Court of the United States has consistently held that "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it," citing: Twining v. New Jersey, 211 U. S. 78, Powell v. Alabama, 287 U. S. 45; Holmes v. Conway, 241 U. S. 624; and Blackmer v. United States, 284 U. S. 421; and Snyder v. Massachusetts, 291 U. S. 97? Surely this Court will not dispute the fact that a ruling of the Supreme Court of the United States is the ruling law of the land?

This Court also took issue on the fact that your petitioner did not file his application until more than seven years after the pretense of a trial accorded him. The time element in this particular instance has no bearing whatsoever on the legitimacy of petitioner's arguments, because it does not alter the fact that the judgment obtained by false representation and the mere pretense of a trial is void.

In the last paragraph of the previously quoted communication of this Court, it is stated that: "Your best remedy, under the circumstances, is before the Parole and Pardon Board of the State of Nebraska which is composed of men who are always willing to give attention to such matters if they appear to have merit in them" Again this Court has shown that it is not fully acquainted with the contents of your petitioner's petition and supporting brief argument, because on page 3 thereof your petitioner stated that: "In the intervening years your petitioner has made every effort an uneducated layman could possibly make to have this unjust and illegal imprisonment terminated." To this end your petitioner was given a hearing before the afore- [fol. 67] said Board last August 9, 1939, after six (6) years and eleven (11) months imprisonment. Although your petitioner's institutional record does not show a single report of any kind, and although your petitioner's police record

does not show a single arrest prior to his arrest on the instant charge, the Board refused to grant clemency "because of his past record." Furthermore, the Board could not legitimately "give attention to such matters" complained of by your petitioner because of the provisions of Chapter 29-2612 of the Compiled Statutes of Nebraska for 1929, wherein it is stated that:

"29-2612. Board of Pardons, Confined to propriety of extending executive clemency. The board shall in no case assume to act as a court of review to pass upon the correctness, regularity or legality of the proceedings of the trial court, but shall confine itself to a hearing and consideration of those matters only which probably bear on the propriety of extending executive clemency."

Because of your petitioner's ignorance of his right to appeal, and because your petitioner had no attorney to advise him of his appellate rights following his pretense of a trial, and because the Board of Pardons did not see fit to grant clemency, your petitioner has exhausted every corrective means available in the State of Nebraska except Habeas Corpus. Yet, in the previously quoted communication of this Court, it is stated that: "If the statements made in your petition are true, you probably suffered an injustice, but the remedy cannot be by habeas corpus." Strange as it may seem, this quoted statement is practically identical to one made by Mr. Justice Black of the United States Supreme Court in the case of Johnson v. Zerbst, 304 U. S. 458, with the exception that Mr. Justice Black said that habeas corpus was the proper remedy under these circumstances. The petitioner Johnson had exhausted all available means of relief. Because of his ignorance of court procedure he was deprived of the assistance of counsel and the right of appeal. It was impossible for him to [fol. 68] obtain relief in any manner, so he brought habeas corpus into the courts. In the lower court he was denied, just as this Court has denied your petitioner, but when the case eventually got to the United States Supreme Court, Mr. Justice Black said:

"If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by Habeas Corpus. Of the con-

tention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty it may well be said—as in Mooney v. Holohan, 294 U. S. 103, 113—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' (Mooney v. Holohan, supra, 112) but destructive of a constitutional guaranty specifically designed to prevent injustice."

Truly, your petitioner cannot accept, seriously, the statement by this Court that "the remedy cannot be by habeas corpus" in the face of the fact that this Court did acknowledge that "If the statements made in your petition are true, you probably suffered an injustice," because such a ruling by this Court would be absolutely contrary to the above quoted ruling of the United States Supreme Court. Surely this Court would not think of contradicting the Supreme Court of the land.

As previously quoted, this Court said: If the Statements made in your Petition are true, you probably suffered an injustice. Because of this fact, if for no other, it is the duty of this Honorable District Court of Nebraska to issue the writ instanter upon application, because

"It is not a question, at the time of the application for the writ, whether or not the facts alleged in the petition are true or false. They are to be verified by the oath of the petitioner, and if he sets out in his petition what is necessary to give a * * * court jurisdiction, the writ *must* issue, *and the truth or falsity of the facts alleged must be determined at the hearing.*" Electoral College Case (C. C. S. C. 1876) 1 Hughes 571, 8 Fed. Cas. No. 4, 336. See also Greenwald (C. C. Cal. 1896) 77 Fed. 590. (Italics supplied.)

These same contentions of law were also upheld in a much later case, because it was stated that:

[fol. 69] "In a habeas corpus proceeding the court is bound to assume the truth of the allegations in the petition." Ex parte Kerekes (D. C. Mich. 1921) 274 Fed. 870.

In denying your petitioner's application for a writ of habeas corpus, this Court apparently took under consideration only the petitioner's first reason relied upon for the issuance of the writ. A further examination by this Court will disclose that there are at least two more reasons why the writ should

issue, namely (1) that your petitioner was deprived of the assistance of counsel, and (2) that the trial court failed to acquire jurisdiction to begin the proceedings which ultimately became the mere pretense of a trial. All of your petitioner's contentions are supported in a manner not to be lightly cast aside. To all of his contentions your petitioner took an oath, verifying that each and every one of them was the truth. The contention and allegation, under oath, that one is restrained and deprived of his liberty unlawfully is sufficient cause to fulfill the requirements of the foregoing quotations rendered by United States Courts. It must follow, then, that the fulfilling of the same requirements would also be sufficient for this Court, because it would also fulfill the requirements of Chapter 29-2801, which also requires an oath or affirmation.

The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. The civil right of personal liberty has been violated in the instant case not only by the respondent but also by this Court, because:

"On application for writ of habeas corpus, the court should proceed summarily to determine the facts and dispose of the party as law and justice require." Copeland v. Archer, (C. C. A. Wash. 1931) 50 F. (2d) 836.

The very nature of this Court's communication to your petitioner indicates that your petitioner has suffered an injustice. Surely "law and justice" do not require this Court to deny your petitioner a hearing on his application for habeas corpus when such an indication of injustice exists. On the [fol. 70] contrary, "Law and justice" require that an immediate and thorough investigation of the facts be made, together with a determination as to just why such injustices can be meted out in the name of the law.

In the case of McCarty v. Hopkins, supra, and in other similar cases, (all of which your petitioner believes this Court to consider "the law") the Supreme Court of Nebraska has held that a plea entered to a criminal charge is an automatic waiver to any constitutional right which might have been obtained before the plea was entered. This holding, of course, is contrary to all the precepts of constitutional law as interpreted by the United States Supreme Court, because it condones the deprivation of fundamental constitutional rights. It condones trickery; it condones the

"third degree"; it condones the deprivation of counsel; it condones any act a trial court may take contrary to law. Why does the opinion in the case of McCarty v. Hopkins, supra, condone all of these violations of constitutional rights? Simply because the average defendant in a criminal action in the State of Nebraska, and your petitioner in particular, is induced, coerced, or duped into entering a plea before he is told that, once upon a time, he did have certain constitutional rights. But after the plea is entered, he no longer has those rights. Is this law and justice? With all due respect to the Supreme Court of Nebraska, it seems to your petitioner that this line of reasoning is a weak excuse to offer unscrupulous courts and court officials a free hand in the manner in which they shall handle ignorant, uneducated, and illiterate defendants in criminal actions. In any event, such a ruling by the Supreme Court of Nebraska cannot be considered the law of the State, because it is contrary to the law of the land, as rendered by the Supreme Court of the United States.

Your petitioner alleged, among other things, a "fix". This, in itself, should be a sufficient allegation to cause this Court [fol. 71] to hold a hearing, that all the matters complained of could be investigated in open court. A District Court of the State of Nebraska has no more right or authority to violate the law than has the alleged criminal whom the District Court is supposed to judge. If the criminal procedural methods in a District Court of Nebraska have not been what they should be, they should be investigated and the truth brought to light where it could be viewed by the general public. Fear should be no part of the investigation.

Without fear of reprisal, your petitioner alleged the deprivation of fundamental constitutional rights involving all of the officials of the trial court. This fact alone indicates a complete and thorough flouting of the Constitution of the United States on the part of the trial court, and further indicated that mobocracy, and not law and justice, prevailed at the time of your petitioner's pretense of a trial. Yet, in the face of all this, this Court said that habeas corpus was not the proper procedure. Your petitioner sincerely believes that if this Court will thoroughly examine all of his petition and supporting brief argument, facts heretofore unknown to this Court will be disclosed.

Wherefore, your petitioner, Albert Smith, the movant herein, respectfully moves this Honorable District Court

of the Third Judicial District of Nebraska to set aside and consider for naught the aforesaid Order, entered February 28, 1940, at Docket V Page 248, wherein this Court dismissed petitioner's application for a writ of habeas corpus; and

Petitioner further moves this Honorable District Court to reconsider petitioner's application for a writ of habeas corpus and to allow the writ as prayed for in accordance with the provisions of Chapter 29-2801, and subsequent chapters, of the Compiled Statutes of Nebraska for 1929; and,

Petitioner further moves this Honorable District Court to grant him the assistance of legal counsel in the hearing [fol. 72] of his case upon the issuance of the aforesaid writ of habeas corpus.

And your petitioner will ever pray.

Respectfully submitted, Albert Smith, Movant and Petitioner.

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OF SUBMISSION—March 5, 1940

Now on this day the application of petitioner for reconsideration is submitted to the court.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING MOTION OF PETITIONER FOR RECONSIDERATION OF CASE—March 11, 1940

This cause now comes on to be heard on motion of petitioner for reconsideration of this case, and having been heretofore submitted to the court, now comes on for final determination, and is overruled by the court, to which petitioner excepts.

[fol. 73] IN DISTRICT COURT OF LANCASTER COUNTY

ACKNOWLEDGMENT—Filed March 20, 1940

V-248

Albert Smith, Box 11-283, Lancaster via Lincoln, Nebr.

DEAR SIR:

I, the undersigned, Walter R. Johnson, Attorney General for the State of Nebraska, do hereby acknowledge receipt of a carbon copy of an original petition for a writ of habeas corpus, wherein Albert Smith is the petitioner and Joseph O'Grady, Warden of the Nebraska State Penitentiary, is the respondent.

I acknowledge receipt of a carbon copy of this petition as counsel for the respondent this 14th day of February, A. D. 1940.

Walter R. Johnson, Attorney General for the State of Nebraska. By George W. Ayres, Assistant Attorney General.

IN DISTRICT COURT OF LANCASTER COUNTY

ACKNOWLEDGMENT—Filed March 20, 1940

Albert Smith, Box 11-283, Lancaster via Lincoln, Nebr.

DEAR SIR:

I, the undersigned, Walter R. Johnson, Attorney General for the State of Nebraska and counsel for the respondent, in the case of Albert Smith, Petitioner, vs. Joseph O'Grady, Warden of the Nebraska State Penitentiary, Respondent, do hereby acknowledge receipt of a carbon copy of the petitioner's Motion for Reconsideration for Writ of Habeas Corpus.

Service made this 4th day of March, A. D., 1940.

Walter R. Johnson, Attorney General for the State of Nebraska and Counsel for the Respondent. By C. S. Beck, Assistant Attorney General.

[File endorsement omitted.]

[fol. 74] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION TO APPOINT COUNSEL—Filed March 25, 1940

Comes now the movant, Albert Smith, who is the appellant in the above entitled cause of action, and respectfully moves this Honorable Court to appoint an attorney to aid and assist him in the preparation of his appeal from the final order and judgment of this Court, in the above entitled cause of action, to the Supreme Court of the State of Nebraska, said final order and judgment of this Court being to dismiss the appellant's original petition for a writ of habeas corpus.

The movant states that, because of his poverty, he is unable to secure the aid or assistance of competent legal counsel, and it is herein respectfully requested that this Court allow counsel fees so incurred to be taxed to Lancaster County, Nebraska, as costs and audited as per the provisions of Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929, and as required by the interpretation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States by the Supreme Court of the United States.

The movant herein has invoked his constitutional and statutory right to the assistance of counsel, as shown in the preceding paragraphs, on the ground that habeas corpus is still habeas corpus no matter under what circumstances or under what conditions it may be invoked. The Legislature of the State of Nebraska saw fit to include the right to demand the assistance of legal counsel when Chapter [fol. 75] 29-716 of the Compiled Statutes of Nebraska, Supplement for 1937, was being prepared for passage, for it is stated therein, that:

"29-716. Arrest, Opportunity to be Given Prisoner to Apply for Writ of Habeas Corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged AND THAT HE HAS THE RIGHT TO DEMAND LEGAL COUNSEL: * * *." (Capitals supplied.)

True enough, the circumstances related to the above quoted statute concern only the subject of extradition, but, in habeas corpus, there is one thing that never changes. The One for Whom the Writ is Being Sued Out is Always the Petitioner, and, regardless of the fact that habeas corpus is considered to be a civil procedure in the State of Nebraska (although it is criminal in nature), and regardless of the fact that the laws of Nebraska do not provide a method of supplying counsel for the plaintiff in a civil action, if it is lawful for a court of record of the State of Nebraska to appoint counsel to assist the petitioner in a habeas corpus action under one circumstance, it is also lawful for a court of record of the State of Nebraska to appoint counsel to assist the petitioner in a habeas corpus action under any other circumstance. In his original petition the appellant (the petitioner therein) requested the assistance of legal counsel to aid and advise him in the prosecution of his case. This request was made by motion to this Court, but, so far as the appellant knows, his motion was ignored and never acted upon. This is contrary to the rudimentary demands of justice as laid down by the Supreme Court of the United States and as imbed-ed in the Fourteenth Amendment to the Constitution of the United States, wherein due process of law and equal protection of the laws is provided for all citizens and residents of the United States. The appellant is a citizen of the United States.

When preparing Chapter 29-716, supra, for enactment, [fol. 76] the Legislature of the State of Nebraska fully realized the inability of an ordinary layman to protect his rights, for even the — intelligent and uneducated layman has small and sometimes no skill in the science of law, and therefore provided that the petitioner in a habeas corpus action shall have the right to demand the assistance of legal counsel. The appellant's ability to protect his rights, or his knowledge of the intricacies of an appeal, have not been increased by the fact that his action does not come under the provisions of the aforesaid Chapter 29-716, supra. He is still the same unintelligent, ignorant, and uneducated layman that he would be had this action been invoked under the provisions of the aforesaid Chapter 29-716, supra, and under the provisions of which this Court would appoint counsel upon the demand for same.

The movant herein, the appellant in this habeas corpus action, is an uneducated layman who lacks both the skill and knowledge to adequately prepare an appeal. He also lacks the funds necessary to hire competent legal counsel to prepare an appeal. As was so properly said by the United States Supreme Court in the case of Palko v. Connecticut, 302 U. S. 319, 325, "justice will not still be done" if the appellant, the movant herein, is not granted, as an impecunious person, the aid and assistance of competent legal counsel to prepare his appeal.

Wherefore, the movant herein, Albert Smith, who is the appellant in this action, respectfully moves this Honorable Court to allow this motion in forma pauperis, to the end that law and justice may prevail.

Respectfully submitted, Albert Smith, Movant and Appellant.

Duly sworn to by Albert Smith. Jurat omitted in printing.

[fol. 77] [File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION TO ALLOW COST OF PRINTED BRIEFS FOR APPEAL—Filed March 25, 1940

Comes now the movant, Albert Smith, who is the appellant in the above entitled cause of action, and respectfully moves this Honorable Court to allow cost of printed briefs for appeal, the costs so incurred to be taxed to Lancaster County, Nebraska.

The movant states that, because of his poverty, he is unable to pay the cost of printing said briefs on his appeal to the Supreme Court of Nebraska, and that his briefs must be printed in order to comply with the rules of the said Supreme Court of Nebraska.

Wherefore, the movant herein, Albert Smith, who is the appellant in this action, respectfully moves this Honorable Court to allow this motion in forma pauperis, to the [fol. 78] end that law and justice may prevail.

Respectfully submitted, Albert Smith, Movant and Appellant.

Duly sworn to by L. M. Larsen. Jurat omitted in printing.

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

FORMA PAUPERIS AFFIDAVIT—Filed March 25, 1940

STATE OF NEBRASKA,
County of Lancaster, ss:

Comes now the affiant, Albert Smith, who is the appellant in the above entitled cause of action, and respectfully prays [fol. 79] that this Honorable Court grant him leave to prosecute his appeal from the adverse ruling of this District Court of the Third Judicial District of Nebraska to the Supreme Court of Nebraska as an impecunious person.

Affiant states that, because of his poverty, he is unable to pay the Clerk's fees for the preparation of the transcript, or any other cost attached to the aforesaid appeal, and that he has no real nor personal property to give as security for such costs.

Affiant states that he verily believes he has a meritorious cause of action and that he is entitled to the redress sought in his original petition and this appellate action.

Wherefore, affiant prays that he be awarded the right to appeal and proceed with his cause of action as an impecunious person as herein requested and to prosecute same to a conclusion without cost, and affiant will ever pray.

Albert Smith, Affiant.

I, L. M. Larsen, a duly appointed and authorized Notary Public in and for Lancaster County, Nebraska, to hereby certify that the above and foregoing Forma Pauperis Affidavit was subscribed in my presence and sworn to before me this 22 day of March, 1940.

L. M. Larsen, Notary Public in and for Lancaster County, Nebr. My commission expires November 19th, 1943. (Seal.)

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed March 25, 1940

[fol. 80] To the Clerk of the District Court of the Third Judicial District of Nebraska, Lincoln, Nebraska:

Notice is hereby given you that Albert Smith, the petitioner in the above entitled cause of action and the appellant herein, has this day taken his appeal from the final order and judgment of the District Court of the Third Judicial District of Nebraska in and for Lancaster County, dismissing the petition for a writ of habeas corpus and refusing to grant relief prayed for therein, to the Supreme Court of the State of Nebraska, said order dismissing said petition being made and entered of record on or about the 28th day of February, 1940.

Albert Smith, Appellant.

[File endorsement omitted.]

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR APPOINTMENT OF COUNSEL—March 26, 1940

This cause now comes on to be heard on motion of appel-
[fols. 81-83] lant Albert Smith for the appointment of counsel to prepare appeal from judgment of this court to the Supreme Court and is submitted to the court, on due consideration whereof, the Court doth overrule said motion, to which appellant excepts.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING MOTION TO ALLOW COST OF PRINTED BRIEFS FOR APPEAL—March 26, 1940

This cause now comes on to be heard on motion of appellant Albert Smith for order allowing the cost of printed appeal to Supreme Court in this action to be taxed to Lan-

caster County, Nebraska, and is submitted to the court, on due consideration whereof, the Court doth overrule said motion, to which appellant excepts.

Praecipe for transcript omitted in printing.

[fols. 84-85] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 86] IN SUPREME COURT OF NEBRASKA

ALBERT SMITH, Petitioner and Appellant,

v.

JOSEPH O'GRADY, Warden of the Nebraska State Penitentiary, Respondent and Appellee

MOTION FOR THE APPOINTMENT OF COUNSEL AND MOTION FOR ALLOWANCE OF COST OF PRINTED BRIEFS ON APPEAL AND ALTERNATE MOTION FOR PERMISSION TO FILE TYPEWRITTEN BRIEFS OF APPEAL AND ALTERNATE MOTION FOR APPEAL TO BE HEARD ON RECORD—Filed April 29, 1940

Comes now the movant, Albert Smith, who is the appellant in the above entitled cause of action, and respectfully moves that this Honorable Court appoint an attorney to aid and assist the appellant in the intracacies of his appeal. The right to the assistance of legal counsel is here invoked, in forma pauperis, under color of authority of Chapters 29-716 and 29-1803 of the Compiled Statutes of Nebraska for 1929 and supplements for 1937, and the Fourteenth Amendment to the Constitution of the United States. This statutory and constitutional right to the assistance of counsel is invoked on the ground that, no matter what the circumstances may be wherein habeas corpus is sought by a petitioner, the action is always of a civil nature and the petitioner is always the plaintiff, and the rights allowed to one petitioner for habeas corpus by the laws of a state must also be allowed to all petitioners for habeas corpus in the same state, because if this practice be not followed, there will be no equal protection of the laws of that state as required by the Fourteenth Amendment to the Constitution of [fol. 87] the United States. Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929 provides for the ap-

pointment of counsel in criminal actions in the State of Nebraska, and also provides a manner wherein said appointed counsel may receive just compensation for their services. Chapter 29-716 of the Compiled Statutes of Nebraska, Supplement for 1937, provides for the appointment of legal counsel to aid and assist the petitioner for a writ of habeas corpus in an extradition proceeding, because therein it is stated that:

"Ch. 29-716. Arrest, Opportunity to be Be Given Prisoner to Apply for Writ of Habeas Corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged *and that he has the right to demand legal counsel;* and if the prisoner, his friends or counsel shall state that he or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a court of record in this state, who shall fix a reasonable time to be allowed him within which *to apply for a writ of habeas corpus;* and, when such writ is applied for, notice * * *." (Italics supplied.)

The Fourteenth Amendment to the Constitution of the United States provides, among other things, that:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws."

The appellant herein is a citizen of the United States. To deny him the right to the assistance of counsel would be an abridgment of his privileges and a denial of equal protection of the laws of the State of Nebraska contrary to the requirements of the Fourteenth Amendment, supra. The movant herein is an uneducated layman 63 years of age who lacks both the skill and knowledge to adequately present his appeal to this Court. It is, therefore, the duty of this Court to appoint counsel to aid and assist the appellant as requested herein, in order that law and justice may prevail.

The movant herein, Albert Smith, further respectfully moves this Honorable Court to issue an order allowing the

[fol. 88] appellant the cost of printing his briefs on appeal in the instant case, the cost of same to be taxed by this Court jointly to Lancaster County and the State of Nebraska. The appellant is a pauper and is, therefore, unable to pay this cost. This fact is shown by the attached forma pauperis affidavit. However, if this Court does not consider it advisable to allow this cost, the movant respectfully presents the following alternate motion for the consideration of this Court.

Comes now the movant, Albert Smith, and respectfully moves this Honorable Court that, if the foregoing Motion for Allowance of Cost of Printed Briefs on Appeal be denied, an order be issued allowing the appellant the right to file typewritten briefs for his appeal. As shown by the attached affidavit, the appellant is a pauper and is, therefore, entitled to this right as a matter of equal justice to all. Other persons, also declared paupers by affidavit, have been permitted by this Court to file typewritten briefs when they lacked the wherewithal with which to have appellate briefs printed as required by this Court. Some of the recent cases dealt with in this manner are as follows:

Hawk v. O'Grady, No. 30708 Nebraska Supreme Court, Allowed to file typewritten briefs May 25, 1939;

Alexander v. O'Grady, No. 30743 Nebraska Supreme Court, Allowed to file typewritten briefs July 3, 1939;

Thompson v. O'Grady, No. 30714 Nebraska Supreme Court, Allowed to file typewritten briefs July 17, 1939;

Davis v. O'Grady, No. 30759 Nebraska Supreme Court, Allowed to file typewritten briefs Sept. 16, 1939;

Dunham v. O'Grady, No. 30778 Nebraska Supreme Court, Allowed to file typewritten briefs Sept. 16, 1939;

Bartel v. O'Grady, No. 30807 Nebraska Supreme Court, Allowed to file typewritten briefs Sept. 16, 1939.

In each of the six foregoing cases, the appellant was a pauper, just as the appellant in the instant case. The Fourteenth Amendment to the Constitution of the United States guarantees that:

[fol. 89] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws."

The appellant is a citizen of the United States by birth, and as such he is entitled to the full protection of the Constitution of the United States. This Court has, by its past actions, set a precedent which cannot be justifiably retracted. The above quotation from the Fourteenth Amendment, supra, literally commands that equal justice be accorded to all citizens of the United States; partiality and discrimination can play no part in the administration of justice. And, because "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, *shall not be denied*" (Art. I Sec. 24, Const. of Nebr.), and, because the appellant is a pauper who is unable to provide printed briefs for his appeal, the appellant respectfully moves that this Honorable Court consider the attached sample typewritten brief, fifteen (15) identical copies of which the appellant wishes to file in order to complete his appeal as provided by law; and, upon consideration thereof, that this Honorable Court issue an order allowing the appellant to file fifteen additional copies as per the attached sample brief. However, if this Court does not see fit to allow the appellant to file typewritten briefs as herein requested, the appellant, the movant herein, respectfully presents the following alternate motion for the consideration of this Court.

Comes now the movant, Albert Smith, and respectfully moves this Honorable Court that, if the foregoing Motion for Allowance of Cost of Printed Briefs on Appeal, and the alternate Motion for Permission to File Typewritten Briefs on Appeal, both be denied, an order be issued allowing the appellant the right to have his appeal heard upon the record. Article I Section 24 of the Constitution of Nebraska provides that:

[fol. 90] "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, *shall not be denied.*" (Italics supplied.)

This motion is a last resort insofar as the appellant is concerned. Paraphrasing the above constitutional quotation, the right to have an appeal on a habeas corpus action shall not be denied to a pauper. The appellant herein has shown that he is a pauper who is unable to pay the cost of printed briefs on appeal; the appellant has respectfully requested the right to file typewritten briefs on appeal; the appellant has herein requested that if permission be not granted him to file typewritten briefs, he be permitted to have his appeal heard upon the record. If the appellant cannot pay for printed briefs, and if this Court will not hear his appeal either on typewritten briefs or on the record, how, in the name of all that is just, can the provisions of Article I Section 24 of the Constitution of Nebraska, supra, be fulfilled? Would it be equal protection of the laws and due process of law if it were only possible for a rich man, who could pay for the cost of printed briefs on appeal, to have an appellate hearing in this Court? Should Article I Section 24 of the Constitution of Nebraska be inte-preted to read that "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied; Provided, that the appellant be not a pauper"? Considering all these facts, the appellant herein respectfully moves that, if the Motion for Allowance of Cost of Printed Briefs on Appeal, and the alternate Motion for Permission to File Typewritten Briefs on Appeal, both be denied, the appellant herein be allowed to file typewritten Errors Relied Upon for Reversal as shown in the attached sample brief and thereafter have his appeal heard upon the record as prepared by the Clerk of the Lancaster County District Court.

The appellant, Albert Smith, who is the movant herein, further respectfully moves this Honorable Court to consider these motions instanter, and, upon consideration thereof, to issue an order to the Clerk of this Court instruct-
[fol. 91] ing him to deliver to the appellant a certified copy of the Orders made by this Court upon these motions.

Respectfully submitted, (Signed) Albert Smith,
Movant and Appellant.

IN SUPREME COURT OF NEBRASKA

[Title omitted]

AFFIDAVIT OF SINCERITY AND POVERTY—Filed April 29, 1940

STATE OF NEBRASKA,
County of Lancaster, ss:

Albert Smith, the affiant herein, of lawful age, being first duly sworn upon his oath, deposes and sayeth: That, he is the appellant in the above entitled cause of action, and that the facts as stated in the attached Motion for the Appointment of Counsel, Motion for Allowance of Cost of Printed Briefs on Appeal, Motion for Permission to File Typewritten Briefs on Appeal, and Motion for Appeal to Be Heard on Record are true ccording to his best knowledge and belief and that such motions are filed with all sincerity and truth.

The affiant herein further deposes and sayeth: That, he is an impecunious person, that he has no money with which to finance the cost of printing briefs on appeal in the above entitled cause of action, and that he has no real nor personal property to give as security for cost of same.

(Signed) Albert Smith, Affiant.

The above and foregoing Affidavit of Sincerity and Poverty subscribed in my presence and sworn to before me this 23 day of April, A. D., 1940.

[fol. 92] (Signed) L. M. Larsen, Notary Public in and for Lancaster County, Nebr. (Seal.)

My commission expires November 19th, 1943.

[File endorsement omitted.]

[fols. 93-117] Brief of Appellant omitted in printing.

[fols. 118-120] Motion for Extension of Time for Filing of Appellant's Brief omitted in printing.

[fols. 121-122] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL, ETC.
May 20, 1940

This cause coming on for hearing upon motion of appellant for the appointment of counsel and for the allowance

of the cost of printed briefs on appeal, or in the alternative for leave to file typewritten briefs, or to be heard upon the record, to which motion was attached typewritten brief which appellant asked leave to file, was submitted to the court. And the court having examined the transcript from the district court of Lancaster county, which transcript contains appellant's original petition for writ of habeas corpus containing a brief in support of such petition, and having also examined the typewritten brief of appellant tendered herein, and being fully advised in the premises, finds that the appeal herein is without merit and that the record contains no probable error. It is, therefore, considered, ordered and adjudged that said motion be, and the same hereby is, denied.

Robert G. Simmons, Chief Justice.

[fols. 123-124] IN SUPREME COURT OF NEBRASKA

No. 30990

ALBERT SMITH, Appellant,

v.

JOSEPH O'GRADY, Warden of the Nebraska State Penitentiary, at Lancaster, Lancaster County, Nebraska, Appellee

Appeal from the District Court of Lancaster County

JUDGMENT—June 3, 1940

This cause coming on to be heard upon appeal from the district court of Lancaster county, the same having been reached in its regular order, and no briefs appearing on file as required by the rules of court, it is by the court considered, ordered and adjudged that the judgment of said district court be, and hereby is, affirmed; that appellant pay all costs incurred herein, taxed at $——; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Robert G. Simmons, Chief Justice.

[fols. 125-126] Application for Stay of Issuance of Mandate omitted in printing.

[fol. 127] IN SUPREME COURT OF NEBRASKA

[Title omitted]

MOTION IN FORMA PAUPERIS FOR ORDER ALLOWING PREPARATION OF TRANSCRIPT AND APPOINTMENT OF COUNSEL—Filed June 10, 1940

Comes now the movant, Albert Smith, the petitioner and appellant in the above entitled cause of action, who, feeling sorely aggrieved by the adverse judgment heretofore entered by this Court in the above entitled cause of action on the 3rd day of June, 1940, respectfully moves that an order be issued, directed to the Clerk of this Court, instructing the said Clerk to prepare and deliver to the movant, Albert Smith, without cost, a complete and certified transcript, typewritten, of the record in the above entitled cause of action as requested in the attached praecipe for the transcript, to the end that the movant may abstract the record and prepare his petition to the Supreme Court of the United States for a writ of certiorari,

And, because he is a person of little education and possessing no legal knowledge, the movant herein, Albert Smith, further respectfully moves this Honorable Court to issue an order appointing legal counsel to aid and assist him in the preparation of his petition to the Supreme Court of the United States for a writ of certiorari.

The movant herein states that, because of his poverty, he is unable to pay the Clerk of this Court the required fees for the preparation of the aforesaid transcript or for the certification thereto affixed, and that, also because of such poverty, he is unable to retain competent legal counsel to aid and assist him in the preparation of his petition for a writ of certiorari, and that he has no real or personal prop-
[fol. 128] erty to offer as security for either or any of the above costs.

The movant herein further states that he is a citizen of the United States of America by birth, that he verily believes he has a meritorious cause of action and is entitled to the redress he seeks by the indicated action of certiorari.

This motion, which is made in all truth and sincerity and without collusion or levity, is pleaded on the ground that the petitioner-appellant must have an opportunity to examine and abstract the record in order to prepare his petition to the Supreme Court of the United States for a writ

of certiorari and it is only by this procedure that the petitioner-appellant can comply with Rule 38 Paragraph 1 of the Revised Rules of the Supreme Court of the United States as per February 27, 1939, which requires that:

"A petition for review on writ of certiorari of a decision of a state court of last resort, * * *, shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed."

Wherefore, the movant herein, Albert Smith, respectfully requests that this motion in forma pauperis be allowed in its entirety, to the end that the petitioner-appellant may have an opportunity to examine and abstract the aforesaid transcript of record and prepare the aforesaid petition for a writ of certiorari, and it is further respectfully requested that an order allowing this motion in its entirety shall issue forthwith.

Respectfully submitted, (Signed) Albert Smith,
Movant.

Duly sworn to by Albert Smith. Jurat omitted in printing.

[fols. 129-130] [File endorsement omitted.]

[fols. 131-132] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—June 17, 1940

This cause coming on to be heard upon motion of appellant that issuance of mandate be withheld, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and hereby is, sustained, and issuance of mandate herein is directed to be withheld until September 3, 1940.

Robert G. Simmons, Chief Justice.

[fols. 133-134] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DIRECTING PREPARATION OF TRANSCRIPT, ETC.—June 17, 1940

This cause coming on to be heard upon motion of appellant for an order directing the Clerk of this court to prepare a certified transcript on writ of certiorari to the Supreme Court of the United States, and for the appointment of counsel for appellant, was submitted to the court; upon due consideration whereof, it is by the court ordered that the Clerk of this court be, and he hereby is, directed to prepare for appellant a certified transcript on petition for writ of certiorari to the Supreme Court of the United States, upon the filing by appellant of a praecipe designating the portions of the record to be included. It is further ordered that in all other respects said motion be, and hereby is, denied for want of statutory authorization.

Robert G. Simmons, Chief Justice.

[fols. 135-137] Stipulation as to the Transcript of Record omitted in printing.

[fols. 138-139] Praecipe for Transcript of Record omitted in printing.

[fol. 140] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 141] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Albert Smith, pro se. In forma pauperis. File No. 44,713 Nebraska, Supreme Court, Term No. 364. Albert Smith, Petitioner, vs. Joseph O'Grady, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska. Petition for a writ of certiorari and exhibit thereto. Filed August 22, 1940. Term No. 364 O. T. 1940.

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